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In the Supreme Court of the United States

OCTOBER TERM, 1982

CPC INTERNATIONAL, INC., *et al.*,
Petitioners,

vs.

LISA P. GOLDBERG, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Indirect purchaser plaintiffs brought a state antitrust class action that duplicates Federal antitrust actions brought by direct purchasers. Defendants removed. The Court of Appeals required remand to state court notwithstanding complete diversity of citizenship and the fact that the state plaintiffs seek statutory attorneys' fees that exceed the jurisdictional amount. The questions presented are:

1. In holding that a claim for statutory attorneys' fees in excess of $10,000 does not satisfy the jurisdictional amount, did the Court of Appeals improperly

   (a) Extend this Court's decision in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), to issues that were not before the Court by holding that to establish removal jurisdiction, every class member must have a claim for attorneys' fees in excess of $10,000, notwithstanding that if attorneys' fees are awarded to the class representatives, each will have a claim that exceeds the jurisdictional amount?

   (b) Frustrate this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), by exposing defendants to separate antitrust suits by indirect and direct purchasers, proceeding in different courts?

   (c) Encourage break-away state antitrust actions of the kind recently condemned by this Court in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), by remanding an indirect purchaser antitrust case where there is diversity and the requisite amount in controversy?

2. In the alternative, should the Court hear this case to clarify when a claim—such as the claim to statutory attorneys' fees in this action—is "common and undivided," thereby satisfying the amount-in-controversy requirement for diversity jurisdiction?

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OPINION BELOW

The opinion and judgment of the Court of Appeals, which is printed in Appendix A, has not yet been reported. The order of the District Court for the Northern District of California, entered without opinion, is printed in Appendix B.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on June 10, 1982. A timely petition for rehearing was denied on July 28, 1982. The order denying rehearing is printed in Appendix C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

*The petitioners, their parents, subsidiaries (not wholly owned) and affiliates are: CPC International, Inc., A. E. Staley Manufacturing Company, Standard Brands Incorporated, a wholly owned subsidiary of Nabisco Brands, Inc., Penick & Ford Limited, a wholly owned subsidiary of Univar Corporation, American Maize-Products Company, Anheuser-Busch, Inc., The Hubinger Com-

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1441(a):

> "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

28 U.S.C. § 1441(c):

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

28 U.S.C. § 1332(a):

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> "(1) citizens of different States; * * *."

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pany, a wholly owned subsidiary of H. J. Heinz Company, and National Starch and Chemical Corporation, a wholly owned subsidiary of National Starch and Chemical Holding Corporation, the parent corporations of which are Unilever United States Inc. and Unilever N.V., respectively.

The respondents are Lisa P. Goldberg, The Essential Ingredient, and Black Kettle, Ltd.

STATEMENT OF THE CASE

This is one of more than thirty private antitrust actions brought in the wake of a complaint by the United States alleging violation of a Federal Trade Commission consent order. All of the private complaints, which allege conspiracy to fix prices for corn derivatives, simply copied the government complaint.

On March 28, 1980, the private actions that alleged violations of Federal antitrust laws were consolidated in the District of New Jersey (*In re Corn Derivatives Antitrust Litigation*, MDL-414, 486 F.Supp. 929 (JPML 1980)). Three days later the complaint in this action was filed in California Superior Court. It is identical to the Federal complaints except that it is an action on behalf of a class of indirect purchasers who allege violations of California antitrust law. The named plaintiffs are all California residents; none of the named defendants is a resident of California.

This action was first removed to Federal court in April 1980 but was remanded on the ground that the existence of fictional defendants ("Does") defeated Federal jurisdiction (*Goldberg v. CPC Intern., Inc.* 495 F.Supp. 233 (N.D. Cal. 1980)). Plaintiffs thereafter represented to the state court that no additional parties would be served. Defendants again removed, this time on the ground that the fictional defendants were no longer part of the action, complete diversity existed between the named parties, and the amount in controversy was satisfied because plaintiffs claimed statutory attorneys' fees in excess of $10,000 (28 U.S.C. § 1441(a)). Plaintiffs' motion to remand was denied and appeal was allowed under 28 U.S.C. § 1292(b).

The Court of Appeals reversed. It reasoned that, because each member of the purported class did not claim more than $10,000 in attorneys' fees, the amount in controversy was not satisfied.

REASONS FOR GRANTING CERTIORARI

This case presents an important question of Federal jurisdiction that should be settled by this Court. If left unreviewed, the decision below would foreclose jurisdiction over indirect purchaser antitrust class actions even where there is complete diversity between parties and plaintiffs seek statutory attorneys' fees in excess of the jurisdictional amount.

The crux of the ruling below is the Court of Appeals' erroneous assumption that statutory attorneys' fees cannot satisfy the jurisdictional amount unless each class member in an action claims fees in excess of $10,000. The ruling thus ignores the critical fact that statutory attorneys' fees are properly awarded only to the class representatives, and that those fees would thus exceed the requisite amount in controversy for each named plaintiff. Because removal jurisdiction under 28 U.S.C. § 1441(c) is broader than original diversity jurisdiction, the entire class action would therefore be removable. Moreover, even if the unnamed, absent class members did have a claim to the statutory attorneys' fees, any such claim would be a "common and undivided" interest which "collectively equal[s] the jurisdictional amount" *(Troy Bank v. Whitehead & Co.* 222 U.S. 39, 40-41 (1911)).

This case has broad impact beyond the specific context of statutory attorneys' fees. The decision is important to the judicial administration of the epidemic of "'break-away' litigation" brought by indirect purchaser plaintiffs seeking to avoid the rule established in *Illinois Brick Co. v. Illinois,* 431 U.S. 394 (1981) *(Federated Department Stores, Inc. v. Moitie* 452 U.S. 394, 403 (1981); concurring opinion of Mr. Justice Blackmun). Under *Illinois Brick,* only the purchaser who deals directly with an alleged violator may recover damages under Federal antitrust laws. In the wake

of that decision indirect purchasers have filed scores of state antitrust actions in an effort to avoid this Court's prohibition against indirect price fixing claims.

The decision below forecloses removal jurisdiction of such actions even where there is complete diversity and statutory attorneys' fees will exceed the jurisdictional minimum. The Court of Appeals' decision therefore subverts the policy of encouraging removal of state lawsuits that are carbon copies of Federal antitrust actions. Moreover, by preventing consolidation under 28 U.S.C. § 1407 for coordinated pretrial proceedings, the decision below impairs the efficient administration of complex litigation, it places undue burdens on the courts and the parties, and it defeats this Court's policy against duplicate direct and indirect purchaser actions.

I. The Question Presented Is Important to Judicial Administration and the Operation of the Antitrust Laws.

In *Illinois Brick* the Court expressly considered and repudiated the proposition that it is acceptable to expose a defendant to the "serious risk" of "sixfold or more damages" in multiple lawsuits—some brought by direct purchasers and others by indirect purchasers—in different courts *(Illinois Brick Co.,* supra, 431 U.S. 730, 731, n. 11). The Court held that any alleged overcharge is a "common fund" and that "we are unwilling to 'open the door to duplicative recoveries under § 4" (431 U.S. 731, 737).

Here, as in most indirect purchaser actions filed in state court to avoid the rule in *Illinois Brick,* the state antitrust complaint is simply a copy of Federal antitrust complaints filed by direct purchasers and consolidated pursuant to the multidistrict litigation statute (28 U.S.C. § 1407). The proliferation of such actions, often employed solely as an evasive tactic, is eroding the *Illinois Brick* rule and has created serious problems with respect to operation of the Federal antitrust laws and judicial administration (Indirect Purchaser Suits Under State Antitrust Laws: A Detour

Around the *Illinois Brick* Wall (1981), 34 Stanford L.Rev. 203).

If the decision of the Court of Appeals is permitted to stand, it will be an invitation to state indirect purchaser lawsuits, based on the same wrongs and making claims for the same "common fund" of damages as those being sought in Federal direct purchaser actions. And such indirect purchaser actions will not be removable, even where there is complete diversity between the named parties and statutory attorneys' fees will exceed the jurisdictional minimum.

Because statutory attorneys' fees in state antitrust class actions will invariably far exceed $10,000, even when individual damage claims may not satisfy the amount in controversy, it is essential that this Court resolve the question whether such attorneys' fees satisfy the amount-in-controversy requirement.

II. The Court Below Erroneously Required Remand Where the Parties Are Diverse and Plaintiffs' Claim for Attorneys' Fees Exceeds $10,000.

Amounts claimed as statutory attorneys' fees are included in the amount in controversy (*Missouri State Life Ins. Co. v. Jones* 290 U.S. 199, 202 (1933)).[1] If there is an award of attorneys' fees to the three named plaintiffs here, each of them will have a claim greater than $10,000 (Calif. Bus. & Prof. Code, § 16750(a)). And, if the claims of the named plaintiffs are thus removable, the entire action may be removed. This is because—in contrast to the narrower reach of original diversity jurisdiction—under the removal statute whenever a separate and independent claim that is removable is "joined with one or more otherwise non-removable claims * * * the entire case may be removed" (28 USC § 1441(c). See also 1A Moore's Federal Practice (2d Ed.)

1. The award of attorneys' fees is the property of the plaintiffs, not their attorneys (*International Travel, etc. v. Western Airlines* 623 F.2d 1255, 1274, (8 Cir. 1980) certiorari denied 449 U.S. 1063 (1980); *Capra, Inc. v. Ward Foods, Inc.* 536 F.2d 39, 52 (5 Cir. 1976).

pp. 232, 268; *Northside Iron & Metal Co., Inc. v. Dobson & Johnson, Inc.* 480 F.2d 798, 801 (5 Cir. 1973); *Stokes v. Merrill Lynch, Pierce, Fenner & Smith* 523 F.2d 433, 438 (6 Cir. 1975); *Lowenschuss v. Gulf & Western Industries, Inc.*, 419 F.Supp. 342, 345 (E.D.Pa. 1976). But see 14 Wright, Miller & Cooper, Federal Practice & Procedure, pp. 651-652 and cases cited therein.)

In holding that plaintiffs' claims for attorneys' fees did not satisfy the jurisdictional amount (Appx. A, pp. 3-4), the Court of Appeals erroneously assumed that any attorneys' fees would be awarded to the entire class, not to the three named plaintiffs. But where, as here, the action is brought as a class action, the award of fees is properly made to the representative plaintiffs, who have assumed the risk and borne the expense of the litigation, and who are thus entitled to be reimbursed. It would defy common sense to deliver an attorney-fee windfall to absentee class members who have contributed nothing to the litigation, who have no obligation to class counsel no matter what the outcome, and who may not even know that the action exists until they receive a claim form.[2]

Moreover, long-standing principles of common law, affirmed by this Court, make clear that awards of attorneys' fees made in exercise of a court's equitable jurisdiction do not go to the entire class, but are made to the named plaintiff who "has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself" (*Mills v. Electric Auto-Lite* 396 U.S. 375, 392 (1970)). The purpose of the award is to compensate the class representative for expenses incurred

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2. The representative plaintiffs have no right to reimbursement from the absentees for fees and expenses incurred in prosecuting the action should it fail (*State of Illinois v. Harper & Row Publishers, Inc.* 55 F.R.D. 221, 223 (N.D. Ill. 1972)).

by him to obtain a benefit for the absentees (id., pp. 393-394; *Hall v. Cole* 412 U.S. 1, 5-7 (1973)).

The common sense result that attorneys' fees go to the named plaintiffs who have brought the action, and who are obligated to class counsel, is supported by the language of the California antitrust law and the Clayton Act. Both provide that attorneys' fees are awarded to the person who brings suit, i.e., the person who has "sue[d] therefor" (15 U.S.C. § 15; Calif. Bus. & Prof. Code, § 16750(a).[3]

Alternatively, assuming that all members of the class had claim to the statutory award of attorneys' fees, their interests in that award would be "common and undivided." The award is a single, unitary sum; it is measured by the benefit conferred on the class as a whole, not by aggregating individual claims; no class member has a claim to any predetermined share; if all class members have a claim to the award, then the award is, by assumption, for the benefit of the class as a whole (see, e.g., *Merola v. Atlantic Richfield Company* 515 F.2d 165, 169-171 (3 Cir. 1975); *City of Detroit v. Grinnell Corp.* 495 F.2d 448, 469 (2 Cir. 1974)). Because the class members' interest in the award would be common and undivided, and the award would exceed $10,000, the jurisdictional requirement would be met: "when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough

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3. *Parens patriae* actions are analogous. In those cases, whether brought under Federal or California law, the award of attorneys' fees goes to the named plaintiff—the state—and not to the absentees who have assumed neither risk nor obligation (15 U.S.C. § 15c; Calif. Bus. & Prof. Code, §§ 16750(d) and 16760(e)(3)).

Moreover, the award of attorneys' fees to the class representatives —not to absentees—assumes special importance in California. A California court of appeal has held that in antitrust class actions "fluid recovery" techniques may be used to distribute damages to persons who are not even members of the class (*Bruno v. Superior Court*, 127 Cal. App. 3d 120, 179 Cal. Rptr. 342 (1981)). To enlarge such a distribution by adding attorneys' fees would be nonsensical.

if their interests collectively equal the jurisdictional amount" (*Troy Bank v. Whitehead & Co.* 222 U.S. 39, 40-41 (1911). See also *Zahn v. International Paper Co.*, 414 U.S. 291, 293-294 (1973) where the Court described *Troy Bank* as a "classic statement" of the alternative approaches to satisfying amount in controversy).

Moreover, although the interest in an award of statutory attorneys' fees to an entire class would seem clearly to be common and undivided, as Wright and Miller point out, "the distinction between a common, undivided interest, and several and distinct claims is far from clear" (14 Wright, Miller & Cooper, Federal Practice & Procedure, p. 422). It is therefore important to the determination of jurisdiction in all diversity cases—whether they arise as matters of removal or original jurisdiction—that this Court settle the blurred line between claims that are common and undivided, and those that are separate.

Finally, nothing in *Zahn v. International Paper Co.*, supra, bars removal jurisdiction here, and this is so whether the attorneys' fee award is characterized as a common fund, or whether the award is made to the class representatives. The Court in *Zahn* considered only whether there was *original* jurisdiction of a class action where the representative plaintiffs had $10,000 claims, but most class members did not. There was not, and could not have been, any claim in *Zahn* that the property owners had a common and undivided interest in their damage awards; plaintiffs were 200 lakefront owners who advanced separate damage claims for alleged injury to their individual parcels as a result of pollution (414 U.S. 292).

And in *Zahn*—where the Federal court retained original diversity jurisdiction of the claims of the class representatives (*Zahn v. International Paper Company* 53 F.R.D. 430, 434 (D. Vt. 1971))—there was no occasion to consider whether, if the action had been in the Federal court on

removal, the broad reach of 28 U.S.C. § 1441(c) to otherwise nonremovable claims that are joined with separate and independent removable claims would have permitted removal of the entire action. In short, the court below erred in holding that to affirm removal jurisdiction "would conflict with the policy of *Zahn*" and "would seriously undermine • • • the rule expressed by the Supreme Court in *Zahn*" (Appx. A, pp. 3, 4).

Far from "undermining" or "conflicting" with *Zahn*, if there is any category of cases where the exercise of diversity removal jurisdiction is important, this is it. None of the petitioners resides in California; each is before the Federal District Court in New Jersey in cases that arise from the same alleged wrongful conduct as this state case, and where Federal plaintiffs seek the same common fund of damages that is sought here; this case presents issues of fact and law that are common to and interwined with the state and Federal cases already consolidated in Federal court. We respectfully submit that the petition for certiorari should be granted.

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